

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

NIGEL LAWRENCE DALBERT,  
Petitioner,

v.

GEORGE J. GIURBINO, Warden,  
Respondent.

No. EDCV 06-703-SGL (AGR)

ORDER ADOPTING MAGISTRATE  
JUDGE'S REPORT AND  
RECOMMENDATION

Pursuant 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the Petition, all the records and files herein, the Magistrate Judge's Report and Recommendation, and the objections to the Report and Recommendation that have been filed herein. Having made a de novo determination, the Court agrees with the recommendation of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: 2-29-08

  
STEPHEN G. LARSON  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NIGEL LAWRENCE DALBERT,  
Petitioner,

v.

GEORGE J. GIURBINO, Warden,  
Respondent.

NO. EDCV 06-703-SGL (AGR)

REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Stephen G. Larson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be denied.

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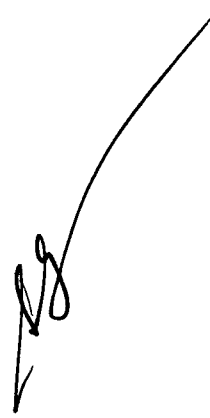
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## I.

**SUMMARY OF PROCEEDINGS**

On March 13, 2003, Petitioner was convicted by a jury in San Bernardino County Superior Court of possession of cocaine base for sale. (Petition at 2; Lodged Document ("LD") 1 at 108.) Petitioner admitted to two prior convictions. (Answer at 2; LD 1 at 105.) On August 14, 2003, Petitioner was sentenced to 25 years to life pursuant to California's Three Strikes Law. (Petition at 2; Answer at 2.)

On November 17, 2004, the California Court of Appeal affirmed the conviction and denied a consolidated petition for habeas relief. (LD 5.<sup>1</sup>) On January 26, 2005, the California Supreme Court denied review without explanation. (LD 7.)

On May 2, 2005, Petitioner filed a petition for habeas relief in San Bernardino County Superior Court. (LD 8.) On May 3, 2005, the court denied the petition ruling that Petitioner had offered "no proof" of his "numerous allegations." (LD 9.) On June 3, 2005, Petitioner filed a petition for habeas relief in the Court of Appeal. (LD 10.) On June 13, 2005, the Court of Appeal denied the petition without explanation. (LD 11.) On July 27, 2005, Petitioner filed a petition for habeas relief in the California Supreme Court. (LD 12.) On May 24, 2006, the California Supreme Court denied his petition without explanation. (LD 13.)

On July 3, 2006, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court in which he raised seven grounds: (1) ineffective assistance for his counsel's failure to move to suppress the drug evidence; (2) cruel and unusual punishment; (3) due process violation because of the trial court's failure to instruct the jury on the lesser included offense of simple

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<sup>1</sup> On December 8, 2004, the court filed an Order Modifying Opinion and Denying Rehearing, No Change in Judgment. (Petition, Appendix.) LD 5 already has the modifications set forth in the December 8 order.



1 possession of cocaine; (4) ineffective assistance for his counsel's failure to  
2 investigate the only line of defense; (5) ineffective assistance for his counsel's  
3 failure to procure proof and rebut key evidence; (6) ineffective assistance for his  
4 counsel's failure to refute prosecutor's misstatements of fact during the  
5 sentencing hearing; and (7) ineffective assistance for his counsel's for his  
6 counsel's failure to object to the trial court's reliance on an improper probation  
7 report during sentencing. (Petition at 5-7.) On September 15, 2006, Respondent  
8 filed an answer, admitting exhaustion of all claims. Petitioner filed a reply on  
9 November 20, 2006.

10 This matter was taken under submission and is now ready for decision.

11 **II.**

12 **STATEMENT OF FACTS**

13 Below are the facts set forth in the California Court of Appeal decision on  
14 direct review. To the extent an evaluation of Petitioner's claims for relief depends  
15 on an examination of the record, the Court has made an independent evaluation  
16 of the record specific to Petitioner's claims for relief.

17 On November, 6, 2001, San Bernardino Police Officer Brian Lewis  
18 was on bicycle patrol with Officers Cordova and Vasillis. At  
19 approximately 3:50 p.m., they observed defendant, who was  
20 standing in front of a vacant house, in an area known for narcotic  
21 activity, and who was looking away from the officers. Officer Lewis  
22 made eye contact with defendant who then turned away, waited for  
23 traffic to clear, and walked across the street. Officer Lewis decided to  
24 make contact with defendant. When contacted, defendant explained  
25 that he had tried to visit a friend who was not home so he was  
26 walking around. All of the officers were in close proximity to  
27 defendant. After detecting the odor of cocaine on defendant, Officer  
28 Lewis asked whether he had any illegal substances on him.

1 Defendant said no, but was moving nervously and reaching into his  
2 pockets.

3 Ignorant of whether or not defendant had a weapon in his pockets,  
4 Officer Lewis told defendant that his actions were making him (the  
5 officer) nervous. Defendant consented to a patdown search, but  
6 when the officer discovered a large bulky item in the front waistband  
7 of defendant's shorts, defendant tensed up and attempted to pull  
8 away. Officer Lewis asked another officer to assist. Officer Reuben  
9 Cordova removed the item from defendant's waistband for officer  
10 safety. The officers discovered five baggies containing rocks of  
11 suspected cocaine base, and enclosed in 10 more plastic baggies.  
12 They also found a razor blade in defendant's wallet and a pager. It  
13 was not ascertained whether or not the pager was functional.

14 Laboratory tests determined the baggies contained a total  
15 approximate amount of 12.6 grams of cocaine base.

16 Officer Lewis opined that the cocaine base was possessed for sale.  
17 He based this opinion on "[t]he amount, that's much larger than a  
18 typical user would have on them, [sic ] as well as the pager which  
19 indicates the defendant would be receiving dial-ups or calls for  
20 delivery. Also the razor blade ... is used by street level dealers to cut  
21 up their cocaine depending on the amount and buy or purchase. Also  
22 the extra baggies, which ... were going to be used for packaging and  
23 torn off as each individual sale occurs. And the fact there was no  
24 paraphernalia found on the subject which would indicate that he  
25 used it in any shape or form." The officer's opinion was further based  
26 on his training and experience. He was involved in over 700  
27 narcotic-related arrests which involved narcotics for sales. Moreover,  
28 Officer Lewis opined that the 12.5 grams was a usable amount of



1 rock cocaine or cocaine base, because it could be cut or diluted for  
2 use or sale in units of .03 to .2 grams. The officer estimated the  
3 cocaine base was worth approximately \$1,200 on the street,  
4 calculated as 60 doses of 0.2 grams selling for \$20 each.

5 Defendant testified in his own defense. He stated that he possessed  
6 the cocaine base for his own personal use, and he had taken it from  
7 the apartment he shared with a roommate. Defendant conceded that  
8 he was unemployed and had no money to buy cocaine. He stated  
9 that he was on his way to a location where he had smoked cocaine  
10 before, and where he knew he would find the paraphernalia he  
11 needed to smoke the cocaine. Defendant testified that he had used  
12 rock cocaine intermittently since 1985, and was using it regularly at  
13 the time of his arrest. He denied selling drugs to support his habit.  
14 He stated that he had the pager with him to tell time, but it was not  
15 activated.

16 (LD 5 at 2-4.)

17 **III.**

18 **STANDARD OF REVIEW**

19 A federal court may not grant a petition for writ of habeas corpus by a  
20 person in state custody with respect to any claim that was adjudicated on the  
21 merits in state court unless it (1) "resulted in a decision that was contrary to, or  
22 involved an unreasonable application of, clearly established Federal law, as  
23 determined by the Supreme Court of the United States"; or (2) "resulted in a  
24 decision that was based on an unreasonable determination of the facts in light of  
25 the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d);  
26 *Woodford v. Visciotti*, 537 U.S. 19, 21, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)  
27 (per curiam).

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1 “[C]learly established Federal law’ . . . is the governing legal principle or  
 2 principles set forth by the Supreme Court at the time the state court rendered its  
 3 decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed.  
 4 2d 144 (2003). A state court’s decision is “contrary to” clearly established  
 5 Federal law if (1) it applies a rule that contradicts governing Supreme Court law;  
 6 or (2) it “confronts a set of facts . . . materially indistinguishable” from a decision  
 7 of the Supreme Court but reaches a different result. *Early v. Packer*, 537 U.S. 3,  
 8 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002). A state court’s decision cannot be  
 9 contrary to clearly established Federal law if there is a “lack of holdings from” the  
 10 Supreme Court on a particular issue. *Carey v. Musladin*, 127 S. Ct. 649, 654,  
 11 166 L. Ed. 2d 482 (2006).

12 Under the “unreasonable application prong” of section 2254(d)(1), a federal  
 13 court may grant habeas relief “based on the application of a governing legal  
 14 principle to a set of facts different from those of the case in which the principle  
 15 was announced.” *Lockyer*, 538 U.S. at 76; see also *Woodford*, 537 U.S. at 24-26  
 16 (state court decision “involves an unreasonable application” of clearly established  
 17 federal law if it identifies the correct governing Supreme Court law but  
 18 unreasonably applies the law to the facts).

19 A state court’s decision “involves an unreasonable application of [Supreme  
 20 Court] precedent if the state court either unreasonably extends a legal principle . .  
 21 . to a new context where it should not apply, or unreasonably refuses to extend  
 22 that principle to a new context where it should apply.” *Williams v. Taylor*, 529  
 23 U.S. 362, 407, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

24 “In order for a federal court to find a state court’s application of [Supreme  
 25 Court] precedent ‘unreasonable,’ the state court’s decision must have been more  
 26 than incorrect or erroneous.” *Wiggins v. Smith*, 539 U.S. 510, 520-21, 123 S. Ct.  
 27 2527, 156 L. Ed. 2d 471 (2003) (citation omitted). “The state court’s application

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1 must have been 'objectively unreasonable.'" *Id.* (citation omitted); see also *Clark*  
 2 *v. Murphy*, 331 F.3d 1062, 1068 (9th Cir.), *cert. denied*, 540 U.S. 968 (2003).

3 "Factual determinations by state courts are presumed correct absent clear  
 4 and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated  
 5 on the merits in a state court and based on a factual determination will not be  
 6 overturned on factual grounds unless objectively unreasonable in light of the  
 7 evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v.*  
 8 *Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); see also  
 9 *Mittleider v. Hall*, 391 F.3d 1039, 1046 (9th Cir. 2004), *cert. denied*, 545 U.S. 1143  
 10 (2005).

11 In applying these standards, this Court looks to the last reasoned State  
 12 court decision. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006). To the  
 13 extent no such reasoned opinion exists, as when a state court rejected a claim in  
 14 an unreasoned order, this Court must conduct an independent review to  
 15 determine whether the decisions were contrary to, or involved an unreasonable  
 16 application of, "clearly established" Supreme Court precedent. *Delgado v. Lewis*,  
 17 223 F.3d 976, 982 (9th Cir. 2000). If the state court declined to decide a federal  
 18 constitutional claim on the merits, this Court must consider that claim under a *de*  
 19 *novo* standard of review rather than the more deferential "independent review" of  
 20 unexplained decisions on the merits authorized by *Delgado*. *Lewis v. Mayle*, 391  
 21 F.3d 989, 996 (9th Cir. 2004) (standard of *de novo* review applicable to claim  
 22 state court did not reach on the merits).

#### 23 IV.

#### 24 DISCUSSION

##### 25 A. GROUND ONE: Ineffective Assistance - Suppression of 26 Evidence

27 *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674  
 28 (1984), is the "clearly established Federal law." To succeed on a claim of



1 ineffective assistance of trial counsel, Petitioner must demonstrate that his  
2 attorney's performance was deficient and that the deficient performance  
3 prejudiced the defense. *Id.* at 687; *Wiggins*, 539 U.S. at 521. The petitioner  
4 bears the burden of establishing both components. *Williams*, 529 U.S. at 390-91;  
5 *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756  
6 (2000). "Deficient performance is performance which is objectively unreasonable  
7 under prevailing professional norms." *Hughes v. Borg*, 898 F.2d 695, 702 (9th  
8 Cir. 1990) (citing *Strickland*, 466 U.S. at 688). Prejudice "focuses on . . . whether  
9 counsel's deficient performance renders the results of the trial unreliable or the  
10 proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.  
11 Ct. 838, 122 L. Ed. 2d 180 (1993); *Williams*, 529 U.S. at 393. "[T]here is no  
12 reason for a court deciding an ineffective assistance claim ... to address both  
13 components of the inquiry if the defendant makes an insufficient showing on one."  
14 *Strickland*, 466 U.S. at 697.

15 In *Stone v. Powell*, 428 U.S. 465, 481-82, 96 S. Ct. 3037, 49 L. Ed. 2d  
16 1067 (1976), the Supreme Court held that when "the State has provided an  
17 opportunity for full and fair litigation of a Fourth Amendment claim, the  
18 Constitution does not require that a state prisoner be granted federal habeas  
19 corpus relief on the ground that evidence obtained in an unconstitutional search  
20 or seizure was introduced at his trial." However, in *Kimmelman v. Morrison*, 477  
21 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), the court held that a  
22 Sixth Amendment claim of ineffective assistance for "counsel's failure to litigate a  
23 Fourth Amendment claim competently" is viable on collateral review. For such a  
24 claim to be successful, a petitioner must prove that "counsel's representation fell  
25 below an objective standard of reasonableness," that "his Fourth Amendment

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1 claim is meritorious and that there is a reasonable probability that the verdict  
2 would have been different absent the excludable evidence.”<sup>2</sup> *Id.*

3 Petitioner contends that his counsel was ineffective in failing to move to  
4 suppress the cocaine base evidence seized by police after the patdown search.  
5 (Petition, Ex. A at 6-21.) The California Court of Appeal’s decision, which is the  
6 last reasoned decision under *Davis*, was not an unreasonable application of  
7 Supreme Court law nor an unreasonable determination of the facts. The court  
8 was “unable to conclude that a motion to suppress evidence would have been  
9 successful.” (LD 5 at 10.)

10 The Court of Appeal broke down the alleged Fourth Amendment claim into  
11 three police actions and examined each: (1) the initial detention of Petitioner, (2)  
12 the patdown search, and (3) the seizure of the bundle of baggies of cocaine base.  
13 (*Id.* at 5-10.) Brian Lewis, the police officer who initially stopped Petitioner, patted  
14 him down, and seized the cocaine from him,<sup>3</sup> testified about the reasons for his  
15 actions. (LD 1 at 24-28; LD 2 at 16-44.) The court concluded that each of Officer  
16 Lewis’s actions was constitutional. (LD 5 at 5-10.) The court noted trial counsel’s  
17 explanation that he did not bring a motion to suppress because he did not believe  
18 “there was any issue with respect to the legality of the seizure or the search.” (*Id.*  
19 at 10; LD 3, Ex. B.)

## 20 1. Initial Detention

21 The state court and Petitioner agree that the legal standard for stopping  
22 him is whether the police had reasonable suspicion that Petitioner was involved in  
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24 <sup>2</sup> Petitioner confuses part of the legal standard. In his reply, he states that  
25 “[a] suppression motion would have, at least, a reasonable probability of  
26 success.” (Reply at 12.) However, “reasonable probability” is the standard for  
27 evaluating prejudice, not for evaluating the merits of the suppression motion. See  
28 *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1170 (9th Cir. 2003) (“petitioner must  
show that (1) the overlooked motion to suppress *would have been meritorious*”)  
(emphasis added); see also *Kimmelman*, 477 U.S. at 382 (“a meritorious Fourth  
Amendment issue is necessary to the success of a Sixth Amendment claim”).

<sup>3</sup> Officer Lewis was assisted by two other police officers. (LD 2 at 21.)

1 criminal activity. (LD 5 at 6; Petition, Ex. A at 8-9.) *United States v. Sokolow*,  
2 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (“Our decision, then, turns  
3 on whether the agents had a reasonable suspicion that respondent was engaged  
4 in wrongdoing when they encountered him on the sidewalk.”).

5 A court looks at the “totality of the circumstances” to determine whether the  
6 police acted reasonably. (LD 5 at 7; Petition, Ex. A at 8.) See *Sokolow*, 490 U.S.  
7 at 7 (in evaluating totality of the circumstances, law enforcement officers may rely  
8 on common-sense conclusions about human behavior). Several factors together  
9 may amount to reasonable suspicion even though “[a]ny one of these factors is  
10 not by itself proof of any illegal conduct” and each factor may be innocent when  
11 viewed separately. *Id.* at 9-10; see *United States v. Arvizu*, 534 U.S. 266, 274,  
12 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Although a mere hunch is insufficient,  
13 “the likelihood of criminal activity need not rise to the level required for probable  
14 cause, and it falls considerably short of satisfying the preponderance of the  
15 evidence standard.” *Id.* at 274. Law enforcement officers may “draw on their  
16 own experience and specialized training to make inferences from and deductions  
17 about the cumulative information available to them.” *Id.* at 273.

18 According to the California Court of Appeal, the totality of the  
19 circumstances that made the stop reasonable were: (1) Petitioner was standing  
20 in front of a vacant house, which Officer Lewis felt was “very suspicious”; (2) a  
21 person standing in front of a vacant house “could be a lookout for someone inside  
22 if they are burglarizing it or vandalizing it”; (3) a person standing in front of a  
23 vacant house could be selling narcotics and intentionally standing in front of a  
24 vacant house to “disassociate[e] themselves with the house. Instead of selling  
25 from their own house, they do it in front of a vacant house so it’s not associated to  
26 them.”; and (4) when Officer Lewis made eye contact with Petitioner, “he  
27 immediately started to walk southbound across the street.” (LD 5 at 6-7; LD 2 at  
28 25-27.)

1 The Court of Appeal's decision was not an unreasonable application of  
 2 clearly established federal law and was not an unreasonable determination of the  
 3 facts. Petitioner's argument that each factor may have an innocent explanation  
 4 (Petition, Ex. A at 11) is clearly insufficient. *Arvizu*, 534 U.S. at 274; *Sokolow*,  
 5 490 U.S. at 9-10. "A determination that reasonable suspicion exists, however,  
 6 need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277.

7 Here, Petitioner does not address the totality of factors relied upon by the  
 8 Court of Appeal to find the stop constitutional. Instead, Petitioner isolates certain  
 9 factors. Petitioner acknowledges that flight from the police may "contribute to a  
 10 reasonable suspicion of criminal activity," but he contends his walking away does  
 11 not constitute flight. (Petition, Ex. A at 11.) However, evidence of flight is not  
 12 required.<sup>4</sup> See *Arvizu*, 534 U.S. at 276 (failure to acknowledge sighted law  
 13 enforcement officer may be considered under totality of the circumstances).<sup>5</sup> The  
 14 Court of Appeal was correct that the manner in which a person avoids police  
 15 contact is relevant to whether a person's conduct is suspicious. (LD 5 at 6-7  
 16 (citing to *People v. Souza*, 9 Cal. 4th 224, 234-35 (1994).) Petitioner also argues  
 17 that being in an "area known for narcotic activity" alone is not "sufficient to justify  
 18 interference with an otherwise innocent-appearing citizen." (Petition, Ex. A 10-11  
 19 (quoting from *Souza*, 9 Cal. 4th at 241).) Again, however, being in an area known  
 20 for narcotic activity may properly be considered in assessing reasonable  
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22 <sup>4</sup> Petitioner's reliance on California law is insufficient for federal habeas  
 23 relief. Petitioner cites to *People v. Moore*, 69 Cal. 2d 674, 683, 72 Cal. Rptr. 800  
 24 (1968), *disapproved on other grounds by People v. Thomas*, 19 Cal. 3d 630, 641  
 n.8 (1977) (fact that defendant in phone booth turned his back on police  
 insufficient to detain him). In any event, the facts of *Moore* are distinguishable.

25 <sup>5</sup> In his reply, Petitioner also argues he was not walking away from the  
 26 police, but in reality walking toward them. Petitioner was on the northwest corner  
 27 of North G and Spruce Streets. (LD 2 at 24.) The police were bicycling north on  
 28 North G Street. (*Id.*) When Petitioner noticed the police, they were 50 yards  
 south of him and on the east side of Spruce. (*Id.*) Petitioner's assertion that he  
 walked toward the police is not accurate. To walk toward the police, he would  
 have had to cross Spruce Street to the east, which he did not do.

1 suspicion. See *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed.  
2 2d 570 (2000) (“officers are not required to ignore the relevant characteristics of a  
3 location in determining whether the circumstances are sufficiently suspicious to  
4 warrant further investigation”); *Arvizu*, 534 U.S. at 277 (defendant’s presence on  
5 route used by smugglers); *Adams v. Williams*, 407 U.S. 143, 144, 147-48, 92 S.  
6 Ct. 1921, 32 L. Ed. 2d 612 (1972) (high-crime area). Officer Lewis testified that  
7 the area in which Petitioner was stopped was “an area of high narcotic activity or  
8 trafficking.” (LD 2 at 44.) The Court of Appeal did not use this factor as one of its  
9 bases for finding that the stop was reasonable. Yet it provides additional support  
10 for its conclusion that the stop was constitutional.

## 11                   2.     **Patdown Search**

12           The Court of Appeal found that the search was constitutional and, in any  
13 event, Petitioner consented to it. Again, Petitioner agrees with the Court of  
14 Appeal as to the legal standard, that “a police officer may conduct a patdown  
15 search for weapons when the officer has reason to believe, based on the totality  
16 of the circumstances, that the suspect is armed and dangerous.” (LD 5 at 8;  
17 Petition, Ex. A at 12.) *Terry v. Ohio*, 392 U.S. 1, 26, 88 S. Ct. 1868, 20 L. Ed. 2d  
18 889 (1968). “The officer need not be absolutely certain that the individual is  
19 armed; the issue is whether a reasonably prudent man in the circumstances  
20 would be warranted in the belief that his safety or that of others was in danger.”  
21 *Id.* at 27. “And in determining whether the officer acted reasonably in such  
22 circumstances, due weight must be given, not to his inchoate and  
23 unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences  
24 which he is entitled to draw from the facts in light of his experience.” *Id.* A  
25 protective search “must be strictly ‘limited to that which is necessary for the  
26 discovery of weapons which might be used to harm the officer or others nearby.’”  
27 *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334  
28 (1993) (quoting *Terry*, 392 U.S. at 26).

The Court of Appeal found the following reasons for the patdown search: (1) Petitioner reached into "his waistband area shorts pockets"; (2) Officer Lewis asked him not to do that and told Petitioner it was making him (the officer) nervous; (3) Officer Lewis told defendant that he would like to conduct a patdown instead of defendant putting his hands in his pants, and asked whether that would be okay; (4) Defendant responded that it would; (5) while conducting the patdown, Officer Lewis felt a large bulk in the front waistband of the defendant's shorts; (6) defendant tensed up and attempted to pull away and separate his hands; (7) Officer Lewis asked Officer Cordova to assist, and Officer Cordova pulled out a large clump of plastic baggies; and (8) burglary and drug-dealer suspects often have weapons. (LD 5 at 8; LD 2 at 28-30.)

Petitioner contends first that his nervousness "does not justify a search." (Petition, Ex. A at 13.) However, the Court of Appeal said nothing about Petitioner's nervousness, only Officer Lewis's. Second, Petitioner contends that his reaching into his pockets did not justify a search because it was in response to Officer Lewis's asking him if he had anything illegal on him. (*Id.* at 13-14.) However, there is no testimony in the record to indicate that Petitioner reached into his pockets simply "to display the contents of his pockets" to Officer Lewis, as Petitioner contends. (*Id.*) As discussed above, Petitioner's argument that there is an innocent explanation for his behavior is clearly insufficient.<sup>6</sup> *Arvizu*, 534 U.S. at 274; *Sokolow*, 490 U.S. at 9-10.

### 3. Seizure of Cocaine Base

Petitioner argues that the search "exceeded the permissible scope of a

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<sup>6</sup> In addition, the Court of Appeal found that Petitioner consented to the search. (LD 5 at 9.) An independent review of the record indicates that a finding of consent was not objectively unreasonable. Officer Lewis told Petitioner "I would feel more comfortable if I could pat him down instead of him putting his hands into his pants, and I asked him if that would be okay. He said sure." (LD 2 at 28.) Petitioner's argument that the officer's "expressed preference that he pat [Petitioner] down" was not a request but a "command" (Petition, Ex. A at 15) is insufficient in light of the testimony in the record.



1 search for weapons.” (Petition, Ex. A at 16.) Officer Lewis testified that while  
 2 patting him down, he “felt a large bulk in the front waistband of his shorts.” (LD 2  
 3 at 29.) Petitioner then “tensed up” and “attempted to pull away from me and  
 4 separate his hands” (Petitioner’s hands had been placed together behind his  
 5 back). (*Id.* at 28-29.) Because Officer Lewis did not know what the “large bulge”  
 6 was, he feared for “officer safety” and asked one of the other officers “to remove  
 7 that from his waistband.” (*Id.* at 30.) Based on this record, the Court of Appeal  
 8 found that the following circumstances provided probable cause to remove the  
 9 object: (1) Petitioner was in an area known for narcotic activity, (2) his body  
 10 emitted an odor of cocaine, and (3) Officer Lewis’s experience in narcotics  
 11 developed his “tactile perceptions.” (LD 5 at 10.) As the Court of Appeal  
 12 explained, the Fourth Amendment does not require an officer “to ignore”  
 13 contraband found during a search for weapons. (*Id.* (citing to *Michigan v. Long*,  
 14 463 U.S. 1032, 1050, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).)

15 The Court of Appeal’s decision was not an unreasonable application of  
 16 clearly established federal law and was not an unreasonable determination of the  
 17 facts. Although Petitioner argues that “[t]here is no indication Officer Lewis  
 18 believed the ‘bulge’ he felt was a weapon” (Petition, Ex. A at 17), Petitioner is  
 19 incorrect. Officer Lewis testified that he did not know what the large bulk was and  
 20 that he feared for officer safety. (LD 2 at 30.) Accordingly, this is not a case in  
 21 which the officer concluded that defendant’s pocket or waistband contained no  
 22 weapon.<sup>7</sup> *Dickerson*, 508 U.S. at 377-78 (“officers continued exploration of  
 23 respondent’s pocket after having concluded that it contained no weapon”  
 24 exceeded scope of *Terry* search). In *Dickerson*, the Supreme Court held that

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25  
 26 <sup>7</sup> Petitioner’s reliance on California law is insufficient for federal habeas  
 27 relief. Petitioner’s citation to *People v. Collins*, 1 Cal. 3d 658, 83 Cal. Rptr. 179  
 28 (1970), is unavailing. In *Collins*, the police felt “a little lump,” which was a “soft  
 object” and which turned out to be a plastic bag of marijuana. *Id.* at 660, 662,  
 664. By contrast, what Officer Lewis felt was a “large bulk” and thus more likely  
 to be a weapon of some kind. (LD 2 at 29.)



1 during a lawful patdown, if an officer “feels an object whose contour or mass  
 2 makes its identity immediately apparent, there has been no invasion of the  
 3 suspect’s privacy beyond that already authorized by the officer’s search for  
 4 weapons; if the object is contraband, its warrantless seizure would be justified by  
 5 the same practical considerations that inhere in the plain-view context.” *Id.* at  
 6 375-76 (footnote omitted); see *United States v. Hartz*, 458 F.3d 1011, 1018 (9th  
 7 Cir. 2006) (officer testified he feared golf-ball-sized cellophane bundle wrapped in  
 8 duct tape could be or could conceal a weapon).

9 Petitioner’s claim fails.

10 **B. GROUND TWO: Cruel or Unusual Punishment**

11 In evaluating an Eighth Amendment claim challenging a sentence for a  
 12 term of years, “[a] gross disproportionality principle” applies. *Lockyer v. Andrade*,  
 13 538 U.S. 63, 72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). The “precise  
 14 contours” of the principle are “unclear”; however, they apply “only in the  
 15 ‘exceedingly rare’ and ‘extreme’ case.” *Id.* at 73. “The gross proportionality  
 16 principle reserves a constitutional violation for only the extraordinary case.” *Id.* at  
 17 77.

18 California’s Three Strikes law was “designed to increase the prison term of  
 19 repeat felons.” *Ewing v. California*, 538 U.S. 11, 15, 123 S. Ct. 1179, 155 L. Ed.  
 20 2d 108 (2003) (citation and internal quotation marks omitted). Under the Three  
 21 Strikes law:

22 “[w]hen a defendant is convicted of a felony, and he has  
 23 previously been convicted of one or more prior felonies  
 24 defined as ‘serious’ or ‘violent’ [under California law],  
 25 sentencing is conducted pursuant to the three strikes law. . .  
 26 . . . . If the defendant has two or more prior ‘serious’ or  
 27 ‘violent’ felony convictions, he must receive ‘an  
 28 indeterminate term of life imprisonment.’”

1 *Id.* at 15-16 (citations omitted). While the prior “strike” convictions must be for  
2 “serious” or “violent” felonies, “any felony can constitute the third strike, and thus  
3 can subject a defendant to a term of 25 years to life in prison.” *Andrade*, 538  
4 U.S. at 67.

5 The California Court of Appeal concluded that the Supreme Court has held  
6 that “California’s Three Strikes law does not violate the Eighth Amendment’s  
7 prohibition on cruel and unusual punishments.” (LD 5 at 14.) The Court of  
8 Appeal’s decision is not objectively unreasonable in Petitioner’s case. In *Lockyer*,  
9 the petitioner’s third strike was based on theft of about \$150 worth of videotapes.  
10 *Lockyer*, 538 U.S. at 66. The first and second strikes were first-degree residential  
11 burglaries. *Id.* at 68. On collateral review, the court found that the petitioner was  
12 not entitled to relief based on the Eighth Amendment.

13 In *Ewing*, on direct review, the Supreme Court again upheld California’s  
14 Three Strikes Law against an Eighth Amendment claim. Ewing’s third strike was  
15 stealing golf clubs with a value of about \$1,200. 538 U.S. at 17-18. His earlier  
16 strikes consisted of three burglaries and a robbery. *Id.* at 19. As the court  
17 explained, “When the California Legislature enacted the three strikes law, it made  
18 a judgment that protecting the public safety requires incapacitating criminals who  
19 have already been convicted of at least one serious or violent crime. Nothing in  
20 the Eighth amendment prohibits California from making that choice.” *Id.* at 25.

21 Against this legal landscape, Petitioner argues that his conviction of  
22 possession cocaine base for sale, coupled with two prior robberies, should be  
23 treated differently because his latest conviction was “passive in nature, and arose  
24 from (sic) directly from the addiction.” (Petition, Ex. A at 22.) Petitioner also  
25 argues that Andrade had served three prison terms and had escaped from  
26 federal prison. (Reply at 24.) Petitioner offers no support that any of these  
27 distinctions is material to his claim of unconstitutionality.

28 ///

1           Petitioner also argues that his case is similar to *Ramirez v. Castro*, 365  
2 F.3d 755 (9th Cir. 2004), in which the Ninth Circuit afforded habeas relief based  
3 on an Eighth Amendment challenge to California's Three Strikes Law. In  
4 *Ramirez*, the petitioner was convicted of shoplifting a \$200 VCR. *Id.* at 768. His  
5 criminal history consisted of two 1991 convictions for second-degree robbery, for  
6 which he was sentenced to one year in county jail and three years probation. *Id.*  
7 *Ramirez* is distinguishable from Petitioner's case. First, Ramirez's conviction was  
8 for stealing a VCR, whereas Petitioner was convicted of possession cocaine base  
9 for sale. *Ramirez* distinguished itself from *Harmelin v. Michigan*, 501 U.S. 957,  
10 994-95, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), because Ramirez's crime was  
11 a "nonviolent petty theft" as opposed to a drug crime. *Ramirez*, 365 F.3d at 768.  
12 Harmelin was convicted of possession of over one and one-half pounds of  
13 cocaine, which the Supreme Court found "threatened to cause grave harm to  
14 society." *Harmelin*, 501 U.S. at 1002. In fact, the court found Harmelin's  
15 contention "that his crime was nonviolent and victimless . . . is false to the point of  
16 absurdity." *Id.* "Possession, use, and distribution of illegal drugs represent 'one  
17 of the greatest problems affecting the health and welfare of our population.'" *Id.*  
18 (citation omitted). Thus, the Supreme Court upheld a sentence of life  
19 imprisonment without the possibility of parole.

20           Although Petitioner did not possess as much cocaine as Harmelin, he  
21 possessed a sufficient amount for the jury to find that he possessed it not just for  
22 his own use but for sale. Moreover, as *Harmelin* found, even simple use of  
23 cocaine affects "the health and welfare of our population." *Id.* Petitioner's  
24 contention that his crime was "passive" is clearly contradicted by *Harmelin*.

25           Under these circumstances, the Supreme Court's decisions in *Ewing*,  
26 *Andrade*, *Lockyer*, and *Harmelin* compel the conclusion that Petitioner's sentence  
27 was not grossly disproportionate to his crime in light of his criminal history. The  
28 ///

1 state court decision was neither contrary to, nor an unreasonable application of,  
2 clearly established federal law. Petitioner's claim fails.

3 **C. GROUND THREE: Failure to Instruct Jury on Lesser Offense**

4 Petitioner contends that the trial court should have on its own instructed the  
5 jury that it could find Petitioner guilty of a lesser included offense to the one  
6 charged. (Petition, Ex. A at 25.)

7 Respondent argues that failure to instruct on a lesser included offense in a  
8 noncapital case does not present a federal question. (Answer at 27.) In *Turner*  
9 *v. Marshall*, 63 F.3d 807 (9th Cir. 1995), *overruled on other grounds by Tolbert v.*  
10 *Page*, 182 F.3d 677 (9th Cir. 1999), the court noted that pursuant to *Beck v.*  
11 *Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), "failure to  
12 instruct on a lesser included offense in a *capital* case would be constitutional  
13 error if there were evidence to support the instruction." *Turner*, 63 F.3d at 818-19  
14 (emphasis in original). However, "[t]here is no settled rule of law on whether  
15 *Beck* applies to noncapital cases." *Id.* at 819. The Ninth Circuit has not  
16 specifically addressed the issue of whether to extend *Beck* but "has declined to  
17 find constitutional error arising from the failure to instruct on a lesser included  
18 offense in a noncapital case." *Id.* (citing to *Bashor v. Risley*, 730 F.2d 1228, 1240  
19 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984); *see also Windham v. Merkle*, 163  
20 F.3d 1092, 1106 (9th Cir. 1998) ("Under the law of this circuit, the failure of a  
21 state trial court to instruct on lesser included offenses in a non-capital case does  
22 not present a federal constitutional question").

23 According to *Turner*, there is an intercircuit split on the issue. *Turner*, 63  
24 F.3d at 819. The Tenth and Eleventh Circuits have found no constitutional right  
25 in noncapital cases, whereas the Third and Sixth Circuits have extended *Beck* to  
26 noncapital cases; and the First and Seventh Circuits have applied *Beck* only "to  
27 prevent a 'fundamental miscarriage of justice.'" *Id.* Finally, *Turner* held that "any

28 ///



1 finding of constitutional error would create a new rule, inapplicable to the present  
2 case under *Teague*.” *Id.*

3 This Court may not grant relief on a “claim that was adjudicated on the  
4 merits in State court proceedings unless the adjudication of the claim resulted in  
5 a decision that was contrary to, or involved an unreasonable application of,  
6 clearly established Federal law, as determined by the Supreme Court of the  
7 United States.” 28 U.S.C. § 2254(d)(1) (emphasis added). Such “clearly  
8 established” Supreme Court precedent is absent. See *Keeble v. United States*,  
9 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) (The Supreme Court  
10 has “never explicitly held that the Due Process Clause of the Fifth Amendment  
11 guarantees the right of a defendant to have the jury instructed on a lesser  
12 included offense”). “A federal court may not overrule a state court for simply  
13 holding a view different from its own, when the precedent from this Court is, at  
14 best, ambiguous.” *Mitchell v. Esparza*, 540 U.S. 12, 17, 124 S. Ct. 7, 157 L. Ed.  
15 2d 263 (2003) (per curiam). Thus, “[a]lthough lower federal court and state court  
16 precedent may be relevant when that precedent illuminates the application of  
17 clearly established federal law as determined by the United States Supreme  
18 Court, if it does not do so, it is of no moment.” *Casey v. Moore*, 386 F.3d 896,  
19 907 (9th Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005).

20 This claim does not present a federal question. Petitioner’s claim fails.

21 **D. GROUND FOUR: Ineffective Assistance - Failure to Investigate**

22 As outlined in Ground One, the clearly established federal law for  
23 evaluating this claim is *Strickland*. Because this ground was denied by the  
24 California Supreme Court in an unreasoned decision (LD 12 and 13), the Court  
25 has conducted an independent review to determine whether the denial was  
26 contrary to, or involved an unreasonable application of, “clearly established”  
27 Supreme Court precedent. *Delgado*, 223 F.3d at 982.

28 ///

Petitioner contends that his trial counsel was ineffective in the following ways: (1) counsel failed to interview Petitioner about the events of November 6, 2001, the date on which Petitioner was arrested; (2) counsel failed to investigate Petitioner's history of drug addiction; (3) counsel failed to interview (a) Petitioner's parole officer, (b) Petitioner's aunt Barbara Davis, (c) Petitioner's aunt Barbara Adams, and (d) Petitioner's brother,<sup>8</sup> all of whom could have testified about Petitioner's long history of drug abuse; (4) counsel failed to interview Otis Simpson, Petitioner's roommate, from whom Petitioner stole cocaine base. (Petition, Ex. A at 29-30.)

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* When an attorney has decided not to investigate because of reasonable tactical evaluations, his or her performance is not constitutionally deficient. *Siripongs v. Calderon (Siripongs II)*, 133 F.3d 732, 734 (9th Cir.), *cert. denied*, 525 U.S. 839 (1998). The duty to investigate "does not necessarily require that every conceivable witness be interviewed." *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) (citations omitted), *cert. denied*, 517 U.S. 1111 (1996). "A claim of failure to interview a witness . . . cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel." *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986) (citation omitted). "[I]neffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (citation omitted).

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<sup>8</sup> Petitioner states that his brother also could have testified about conversations he had with Otis Simpson.



1 Federal habeas review must be “highly deferential,” avoid “the distorting  
2 effects of hindsight,” and “indulge a strong presumption that counsel’s conduct  
3 falls within the wide range of reasonable professional assistance.” *Strickland*,  
4 466 U.S. at 689.

5 Petitioner cannot show any deficiency or prejudice with respect to  
6 counsel’s alleged failure to interview Petitioner. Petitioner was questioned by his  
7 counsel and cross-examined by the prosecutor as to what transpired on  
8 November 6, 2001.<sup>9</sup> (LD 2 at 111-16, 122.) For the reasons set forth under  
9 Ground One, the state court’s ruling as to the propriety of Petitioner’s detention  
10 and search was not contrary to clearly established law and was not an  
11 unreasonable determination of the facts. Any deficiency by counsel would not  
12 have changed the outcome of the proceeding. See *Strickland*, 466 U.S. at 694.

13 Petitioner contends that his counsel should have investigated and  
14 presented witnesses that could have corroborated his testimony that he was a  
15 cocaine addict and had stolen cocaine base from his roommate. Petitioner’s  
16 argument is insufficient to prove deficient performance by counsel or prejudice.

17 The crime of possession of cocaine base for sale requires proof of five  
18 elements. (LD 2 at 153-54.) Petitioner’s testimony at trial did not dispute the  
19 existence of the first three elements – that Petitioner exercised control over  
20 cocaine base, knew of its presence, and knew of its nature as a controlled  
21 substance. (See *id.* at 113-18, 123, 154.) Nor did there appear to be any dispute  
22 that the amount of cocaine base was sufficient for sale or consumption (fourth  
23 element). (*Id.* at 115, 154.)

24 ///

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25  
26 <sup>9</sup> Petitioner does not explain why his testimony at trial did not contain the  
27 information in his reply declaration in this Court. (*Compare* LD 2 at 111-16, 122  
28 with Declaration of Nigel Lawrence Dalbert at 2-3, filed November 20, 2006  
 (“Dalbert Decl.”).) Nor does Petitioner explain why he did not disclose the  
 information to counsel during their conversations about a possible motion to  
 suppress evidence. (Dalbert Decl. at 2.)



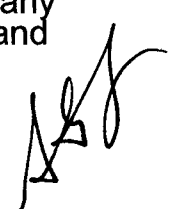


1 Therefore, the key issue is the fifth element requiring that Petitioner  
 2 possessed the cocaine base with the specific intent to sell. (*Id.* at 154.) The  
 3 prosecutor's closing argument did not dispute that Petitioner stole the cocaine  
 4 base from his roommate or that Petitioner had a drug problem. (*Id.* at 164-65.)  
 5 On the contrary, the prosecutor relied on both facts to argue that Petitioner had a  
 6 motive to sell cocaine base to pay back his roommate or buy drugs in the future.  
 7 (*Id.* at 164-65, 174-75.) Defense counsel argued that Petitioner was not engaged  
 8 in any business transactions with anyone at the time of his arrest, had no money  
 9 (which was inconsistent with a purported cocaine salesman), and had no access  
 10 to telephones in the area. (*Id.* at 167-70.) Defense counsel further noted that it  
 11 was undisputed that Petitioner could have consumed 12.61 grams of cocaine  
 12 base.<sup>10</sup> (*Id.* at 171.) Defense counsel referred to Petitioner's testimony that he  
 13 never sold cocaine base. (*Id.* at 126-28, 171.)

14 Under these circumstances, Petitioner cannot establish a reasonable  
 15 probability that the result of the trial would have been different had his counsel  
 16 introduced corroborating testimony that he was a drug addict and had stolen  
 17 cocaine base from his roommate.<sup>11</sup> *Strickland*, 466 U.S. at 694; *Williams*, 529  
 18 U.S. at 391. Nor can Petitioner show that the result of the trial was unreliable or  
 19 that the trial was fundamentally unfair. *Williams*, 529 U.S. at 393 n.17; *Lockhart*,

20  
 21 <sup>10</sup> According to Petitioner's testimony, the cocaine was for his personal use  
 22 that day. (LD 2 at 115.) If he had enough cocaine, he would smoke about .1  
 gram every 15 minutes. At that rate and assuming non-stop smoking, Petitioner  
 would complete smoking the 12.6 grams in 31.5 hours.

23 <sup>11</sup> Petitioner does not explain how his counsel could have obtained  
 24 incriminating testimony from his roommate that the cocaine base belonged to  
 25 him. It is pure speculation on Petitioner's part that his roommate would have  
 26 testified favorably. See *James v. Borg*, 24 F.3d 20, 26 (9th Cir.) ("Conclusory  
 27 allegations which are not supported by a statement of specific facts do not  
 28 warrant habeas relief."), *cert. denied sub nom. James v. White*, 513 U.S. 935  
 (1994); see also *Bean v. Calderon*, 163 F.3d 1073, 1082 (9th Cir. 1998)  
 (petitioner "offers no concrete support for his speculation" regarding his  
 ineffective assistance claim), *cert. denied*, 528 U.S. 922 (1999). Moreover, any  
 testimony from Petitioner's brother about a phone call between the brother and  
 the roommate would have been inadmissible as hearsay. (Petition, Ex. F.)



1 506 U.S. at 369. Corroborating evidence that Petitioner was a drug addict and  
 2 had stolen the cocaine base from his roommate was, at best, ambiguous  
 3 evidence that the prosecutor could and did use against Petitioner. Defense  
 4 counsel could reasonably conclude that such evidence would not materially aid  
 5 Petitioner's defense. See *Darden v. Wainwright*, 477 U.S. 168, 186-87, 106 S.  
 6 Ct. 2464, 91 L. Ed. 2d 144 (1986) (petitioner did not overcome presumption of  
 7 sound trial strategy when counsel failed to introduce evidence that had potential  
 8 to hurt as well as help defense); see also *Lankford v. Arave*, 468 F.3d 578, 583  
 9 (9th Cir. 2006) (federal court must refrain from second-guessing counsel's  
 10 strategies), *cert. denied*, 128 S. Ct. 206 (2007).

11 For these reasons, Petitioner's claim fails.

12 **E. GROUND FIVE: Ineffective Assistance - Failure to Present**  
 13 **Evidence**

14 As outlined in Ground One, the clearly established federal law for  
 15 evaluating this claim is *Strickland*. Petitioner argues that his counsel failed to  
 16 introduce the following evidence or testimony: (1) Paycheck stubs; (2) proof the  
 17 pager was not activated; (3) his car registration; (4) the key to his apartment; (5)  
 18 the clothes Petitioner was wearing on the date of his arrest; (6) the clump of  
 19 baggies in their original state; (7) the investigative report (Petition, Ex. G); (8)  
 20 witness affidavits (Petition, Exs. C-F); (9) testimony from a drug counselor  
 21 (Petition, Ex. H); (10) expert testimony regarding drug dealers and users, and  
 22 (11) expert testimony as to the value of the cocaine. (Petition, Ex. A at 34-36.)

23 **1. Paycheck Stubs**

24 The police seized a check cashing card from Petitioner on the day of his  
 25 arrest, which Officer Lewis identified, and which was introduced into evidence  
 26 without objection. (LD 2 at 37, 109.) There was no testimony about the card  
 27 other than its identification.

28 ///

1           Petitioner argues that, in her closing, the prosecutor stated: "But we know  
2 he [Petitioner] has stole in the past. If he doesn't have a job now, maybe he's  
3 cashing fraudulent checks. I don't know." (*Id.* at 174.) Petitioner contends that  
4 the prosecutor was referring to the check cashing card, and that the inference he  
5 was using the check cashing card was prejudicial. (Petition, Ex. A at 32.)  
6 Petitioner argues his counsel should have introduced paycheck stubs from a  
7 month before the arrest (and before he was fired). (*Id.*; Reply, Dalbert Decl. at 3.)

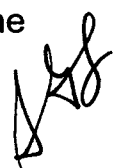
8           Petitioner cannot demonstrate prejudice, and his reasoning is flawed.  
9 Even assuming the jury could infer from the check cashing card that Petitioner  
10 was fraudulently cashing checks to support his habit, such an inference would  
11 have helped Petitioner by providing him a source of funds and eliminating any  
12 need to sell cocaine base.

## 13                   2.     **Pager**

14           Petitioner argues that counsel should have introduced documentation that  
15 his pager was not activated, which would have refuted the inference that he was  
16 using it to receive pages about drug transactions. (Petition, Ex. A at 32; LD 2 at  
17 38.) Petitioner cannot show the requisite prejudice. Officer Lewis testified that he  
18 did not know if the pager was activated. (*Id.* at 57.) Petitioner himself testified  
19 that he had acquired the pager only three hours before his arrest. (*Id.* at 114-15.)  
20 Even assuming the existence of documentation that Petitioner had not activated  
21 the pager (and Petitioner does not identify any such documentation), such  
22 evidence would be subject to rebuttal that Petitioner simply did not have the  
23 opportunity to activate it. Petitioner cannot establish a reasonable probability that  
24 the result of the trial would have been different had his counsel introduced  
25 documentation. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 391.

## 26                   3.     **Car Registration**

27           Petitioner argues that his counsel was deficient for failing to introduce  
28 evidence of his car registration "to refute the government's allegation that, the



1 drugs were not stolen from roommate.”<sup>12</sup> (Petition, Ex. A at 33.) As noted above,  
 2 however, the prosecutor did not dispute that Petitioner stole the cocaine base  
 3 from his roommate. (LD 2 at 164-65.) Petitioner cannot establish a reasonable  
 4 probability that the result of the trial would have been different had his counsel  
 5 introduced the car registration. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at  
 6 391.

#### 7 4. Apartment Key

8 Again, Petitioner argues that his counsel was deficient for failing to  
 9 introduce the key to Petitioner’s apartment “to prove that Petitioner did have a  
 10 roommate to steal drugs from.” (Petition, Ex. A at 33.) As noted above, however,  
 11 the prosecutor did not dispute that Petitioner stole the cocaine base from his  
 12 roommate. (LD 2 at 164-65.) Petitioner cannot establish a reasonable probability  
 13 that the result of the trial would have been different had his counsel introduced  
 14 the key. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 391.

#### 15 5. Clothes

16 Petitioner testified that he wore light blue shorts, a long white T-shirt, white  
 17 socks and blue and white tennis shoes when he was arrested. (LD 2 at 114.)  
 18 Petitioner argues that the clothes he wore on the day of his arrest were the type  
 19 that “drug smokers, not drug dealers” wore. (Petition, Ex. A at 33.) According to  
 20 Petitioner, introduction of the clothes into evidence would have refuted Officer’s  
 21 Lewis’ testimony that Petitioner reached into “his waistband area shorts pockets”  
 22 (LD 2 at 28) because the pockets are on the thighs. (Petition, Ex. A at 33-34.)  
 23 However, given the marginal value of the clothing, Petitioner cannot establish a  
 24 reasonable probability that the result of the trial would have been different had his  
 25 ///

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26  
 27 <sup>12</sup> According to Petitioner’s brother Ian, he received a phone call from  
 28 “Puck,” whom Petitioner identified as his roommate Otis Simpson, in which Puck  
 said he was holding Petitioner’s car as ransom to get back \$500 for the drugs  
 Petitioner stole. (Petition, Ex. F.)

1 counsel introduced the clothing. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S.  
2 at 391.

### 3                   **6.     Baggies**

4           Petitioner argues that his counsel was deficient for failing to introduce into  
5 evidence the baggies in their “original state” to prove that it was impossible for  
6 Officer Lewis to tell what the object was “without further unwarranted inspection.”  
7 (Petition, Ex. A at 34.) Even assuming that the evidence was available (and  
8 Petitioner does not establish that it was), such evidence would not have helped  
9 Petitioner. As discussed above under Ground One, Officer Lewis testified that he  
10 “felt a large bulk,” did not know what it was, and asked Officer Cordova to remove  
11 it for officer safety. (LD 2 at 29-30.) Petitioner would not benefit from presenting  
12 evidence corroborating Officer Lewis’ testimony. Petitioner cannot establish a  
13 reasonable probability that the result of the trial would have been different had his  
14 counsel introduced the baggies. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S.  
15 at 391.

### 16                   **7.     Investigator and Investigative Report**

17           Petitioner argues that his counsel was deficient for failing to call the  
18 investigator as a witness and failing to introduce the investigator’s report into  
19 evidence. However, even assuming admissibility of the report (and Petitioner  
20 does not offer any theory of admissibility), Petitioner does not explain how the  
21 report would have helped him. (Petition, Ex. A at 34, Ex. G.) The investigation  
22 was conducted “for the purpose of a hardship letter to the District Attorney.” (*Id.*,  
23 Ex. G.) The report is generally unfavorable and concludes that “[t]he information  
24 received from the defendant’s family does not appear helpful in any way.” (*Id.* at  
25 4.) Petitioner cannot establish a reasonable probability that the result of the trial  
26 would have been different had his counsel introduced the investigative report.  
27 *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 391.

28   ///



1                   **8.     Witness Affidavits**

2           Petitioner argues that his counsel was deficient for failing to introduce  
3 affidavits from his relatives into evidence.<sup>13</sup> (Petition, Ex. A at 34, Exs. C-F.)  
4 Petitioner cannot establish a reasonable probability that the result of the trial  
5 would have been different had his counsel introduced the affidavits regarding  
6 drug abuse and the stolen cocaine base for the reasons stated under Ground  
7 Four. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 391.

8                   **9.     Drug Counselor**

9           Petitioner argues that his counsel was deficient for failing to introduce  
10 evidence from a drug counselor (prepared for sentencing) that Petitioner would  
11 be accepted into a program on the condition that he is willing to comply with  
12 rules, regulations and structure of the program. (Petition, Ex. A at 34, Ex. H.)  
13 Petitioner's argument is that such evidence would prove drug use, methods of  
14 "ingestion," and usable amounts. (Petition, Ex. A at 34.) However, the  
15 prosecutor did not dispute that Petitioner was a drug addict or that 12.61 grams of  
16 cocaine constitutes a usable amount for purposes of the fourth element of the  
17 offense. (LD 2 at 162 ("So we know the amount was sufficient for use for  
18 personal consumption for narcotic use.")) Petitioner cannot establish a  
19 reasonable probability that the result of the trial would have been different had his  
20 counsel introduced evidence from a drug counselor for the reasons stated under  
21 Ground Four. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 391.

22                   **10.   Expert Testimony**

23           Petitioner argues that his counsel was deficient for failing to introduce  
24 expert testimony regarding drug use, drug prices, methods of ingestion, and  
25 usable amounts. (Petition, Ex. A at 34.) Again, however, the prosecutor did not  
26 dispute that Petitioner had a drug habit or that 12.61 grams of cocaine constitutes

27 \_\_\_\_\_  
28 <sup>13</sup> The majority of affidavits were prepared for purposes of sentencing. (LD  
2 at 194-95; Petition, Exs. C-E.)



1 a usable amount. (LD 2 at 162, 165.) Petitioner's speculation that expert  
 2 testimony might have helped him is insufficient. See *Grisby v. Blodgett*, 130 F.3d  
 3 365, 373 (9th Cir. 1997) ("Speculation about what an expert could have said is  
 4 not enough to establish prejudice."). Petitioner cannot establish a reasonable  
 5 probability that the result of the trial would have been different had his counsel  
 6 introduced expert testimony. *Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at  
 7 391.

# 8 11. Other Drug Cases

9 Petitioner argues that his counsel was deficient for failing to introduce  
 10 evidence about prosecutions against celebrities and others. (Petition, Ex. A at  
 11 35-36.) Petitioner contends that such evidence would refute the prosecutor's  
 12 argument that the cocaine base was worth \$1200. (*Id.*) There is no basis to  
 13 believe that evidence of other prosecutions would have been admissible in  
 14 Petitioner's case. Moreover, Petitioner cannot establish a reasonable probability  
 15 that the result of the trial would have been different had the value of the cocaine  
 16 base been \$500, \$1200 or any other like amount. *Strickland*, 466 U.S. at 694;  
 17 *Williams*, 529 U.S. at 391.

## 18 F. GROUND SIX: Ineffective Assistance - Failure to Object

19 As outlined in Ground One, the clearly established federal law for  
 20 evaluating this claim is *Strickland*. On August 14, 2003, after the trial court heard  
 21 arguments involving a *Romero*<sup>14</sup> defense motion to strike prior convictions, the  
 22 court sentenced Petitioner. (LD 1 at 122-35; LD 2 at 194-203.)

23 Petitioner contends that in the following four instances his counsel failed to  
 24 object or refute misstatements during argument of the *Romero* motion. First,  
 25 Petitioner argues that the prosecutor incorrectly stated that Petitioner "was  
 26 convicted of robbery in 1991 and served one year in state prison for that." (LD 2  
 27

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28 <sup>14</sup> *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996).



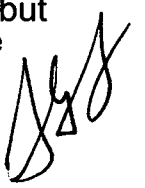
1 at 196.) However, Petitioner attaches evidence that he was convicted of second  
 2 degree robbery based on a plea of nolo contendere and, in 1996, was sentenced  
 3 to imprisonment for one year after revocation of probation for that offense.  
 4 (Petition, Ex. K.) Second, Petitioner argues that the prosecutor incorrectly stated  
 5 that there were "five separate violations of parole following from 1995" (LD 2 at  
 6 196), when in fact he committed fewer than five violations.<sup>15</sup> (Petition, Exs. K, L.)  
 7 Third, according to Petitioner, the prosecutor incorrectly stated during the *Romero*  
 8 hearing that Petitioner was incarcerated eight times for a 1987 conviction, the two  
 9 robbery convictions in 1991 and 1995, and multiple parole revocations. (LD 2 at  
 10 196.) Fourth, according to Petitioner, the prosecutor incorrectly stated during the  
 11 *Romero* hearing that Petitioner's current offense was "serious."<sup>16</sup> (LD 2 at 197.)  
 12 Petitioner concludes, without explanation or support, that these "multiple errors in  
 13 the record" prejudiced him. (Reply at 22.)

14 Petitioner has failed to demonstrate a reasonable probability of changing  
 15 the court's sentencing decision. The court expressly relied upon the probation  
 16 report for Petitioner's convictions, incarcerations and violations of parole. (LD 2  
 17 at 199.) The court referred to "a number of violations of parole" in the report  
 18 without giving a specific number. In addition, the court did not categorize  
 19 Petitioner's possession of cocaine base for sale as a serious offense. The court  
 20 characterized as "serious felony convictions" only Petitioner's two prior robbery  
 21 convictions. (*Id.* at 198.) Petitioner has not shown any error in application of the  
 22 Three Strikes Law.

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23  
 24 <sup>15</sup> The record is not clear as to the total number. It appears that  
 25 Petitioner's second conviction for robbery resulted in revocation of probation for  
 the first robbery conviction. (Petition, Ex. K.) In addition, there appear to be  
 three subsequent revocation hearings. (Petition, Ex. L.)

26 <sup>16</sup> Read in context, the prosecutor stated: "In this case, it was 12 grams of  
 27 cocaine base, which is a significant amount, an amount for sales as the jury  
 found. It's a serious offense, although it does not amount to a violent felony, but  
 28 that's the requirement for the three strikes law. The requirement for the three  
 strikes law as the Court knows is two prior serious felonies." (LD 2 at 197.)



1 Petitioner's claim fails.

2 **G. GROUND SEVEN: Ineffective Assistance - Probation Report**  
 3 **and Criminal History**

4 As outlined in Ground One, the clearly established federal law for  
 5 evaluating this claim is *Strickland*. Petitioner argues that his counsel was  
 6 ineffective in not objecting to or refuting the trial court's statements at the  
 7 sentencing hearing of August 14, 2003. Petitioner's contentions have no  
 8 substance.

9 The court stated that Petitioner violated probation in 1994 (LD 2 at 199),  
 10 whereas Petitioner claims that probation was not formally revoked until 1996.  
 11 (Petition, Ex. A at 42.) However, Petitioner does not dispute that the violation of  
 12 probation occurred, regardless of whether the court viewed the violation as taking  
 13 place on the date of the misconduct as distinguished from the date of the  
 14 revocation hearing. (Petition, Exs. K, N.) Petitioner argues that the court's  
 15 statement that Petitioner was not "outside of the intended three strikes sentencing  
 16 scheme" given "the circumstances of the prior offenses, and their violations,  
 17 subsequent violations, and the current offense" was wrong. (*Id.*; LD 2 at 199.)  
 18 Petitioner also takes issue with the court's statement that Petitioner has had  
 19 "many opportunities . . . to combat the drug addiction and failed to do so."<sup>17</sup>  
 20 (Petition, Ex. A at 42; LD 2 at 199-200.)

21 Petitioner's conclusory statement that any errors were "prejudicial" is  
 22 insufficient. (Petition, Ex. A at 43.) Petitioner cannot establish that any  
 23 objections by his counsel would have had a reasonable probability of changing  
 24 the court's sentencing decision. Petitioner's claim fails.

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25  
 26  
 27 <sup>17</sup> Although Petitioner testified to a drug problem since 1985 (LD 2 at 116-  
 28 17), Petitioner cites only to events after his arrest in November 2001. (Petition,  
 Ex. A at 42.)

V.

**RECOMMENDATION**

For the reasons discussed above, it is recommended that the District Court issue an Order (1) adopting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: February 6, 2008

  
ALICIA G. ROSENBERG  
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.